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No. 94-2012

In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

DAVID B. JACOBS, Esq., Petitioner

v.

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE PETITIONER IN REPLY

DAVID B. JACOBS, Esq.,
Petitioner, pro-se
145D Smith Street Apt. 1D
Freeport, New York 11520
(516) 868-4591

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

In the Matter of DAVID B. JACOBS, an
Attorney and Counselor at Law

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

Respondent,

v.

DAVID B. JACOBS, Esq.,

Petitioner.

BRIEF OF THE PETITIONER IN REPLY

STATEMENT

This reply was necessitated by what, in good faith, the Petitioner thinks are errors, omissions and/or mis-statements of the facts and law as represented by the Respondent's brief..

ARGUMENT

The Respondent's brief at note 5, bottom of page 7 stated that the Petitioner did not seek review in this Court of the Court of Appeals of the State of New York's decision denying the Petitioner's application for permission to appeal. In re Jacobs, 619 N.E.2d 647.

The reason that no direct appeal was taken to this Court within 90 days of the decision referred to above was because it was not a final decision of the highest court of the state within the meaning of, and the Petitioner's interpretation of, the cases requiring that the highest court of the state determine all necessary issues before a writ of certiorari can correctly be made to this Court.

Since the issues of subject matter jurisdiction and denials of due process and other constitutional infirmities were not addressed by either the Appellate Division or the Court of Appeals, the Petitioner had no procedural right to bring on a writ of certiorari to this Court.

It is the very essence of the finality doctrine that precluded the Petitioner from a direct route to this Court, since the decision appealed from was from an intermediate State Appellate Court, namely, the Appellate Division, Second Department of the Supreme Court of the State of New York, which itself did not address the issues of its own subject matter jurisdiction and denials of due process and other constitutional infirmities. This Court, in the case District of Columbia Court of Appeals v. Feldman 460 U.S. 462,

476 (1983) was asked to sit in review of a final judicial decision of a state court. Such is not the case here. In addition, the Petitioner argues that Federal Court review final highest state court decisions in many kinds of cases, especially where equitable relief is requested, such as in Habeas Corpus, Injunction, discrimination, voting, and environmental cases, The Federal Courts have the power to review State Court disciplinary proceeding and decisions when the State Court procedure is wanting in due process, Matter of Gordon, 640 F.2d 1143, or when violative of 42 U.S.C. §1983, Getty v. Reed, 547 F.2d 971. Rosenthal v. Justices of the S. Ct. of California, 910 F.2d at 564, citing Kruso v. Int'l Telephone and Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir. 1989).

The label, whether it be civil, criminal, quasi criminal, is not determinative of whether review is granted, In re Daley, 549 F.2d 469, 474-477 & n.6 (7th Cir.), cert. denied 434 U.S. 829 (1977).

The Petitioner contends that substantial federal questions existed then, and continue to exist now, unanswered by any court below. Among them are the basic fundamental concepts of the right to be tried by a tribunal constitutionally or statutorally empowered to hear and determine the issues concerned with the matter before it, since there is no presumption of jurisdiction with respect to inferior courts of limited jurisdiction, Smith v. Central Trust Co., 154 N.Y. 333, 48 N.E. 553; Steinhardt v. Baker, 163 N.Y. 410, 57 N.E. 629, the right to discovery in a proceeding that could and did result in the loss of the Petitioner's livelihood and license to practice law, the right to a jury trial on the issue of the value of one's legal work, labor and/or services, the right to confront and cross-examine court ordered subpoenaed witnesses and documents in a proceeding termed quasi-criminal in nature, the right and opportunity to confront court ordered subpoenaed adverse witnesses who have been permitted by the State without appearance to offer adverse affidavits without cross-examination.

Both the questions of the finality of the state decision and the underlying authority of the state court to hear and determine the issues before a court of limited jurisdiction distinguish the facts of the instant case from the Feldman case, supra. No formal appeal on the merits was ever decided because both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeal of the State of New York denied the Petitioner leave to appeal. The Petitioner was foreclosed from any higher appellate review. Both the state courts and the federal district court had the issue of the subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee within the construct of a Grievance Committee disciplinary proceeding. Each court failed to evaluate and decide that critical issue. In such an instance, when critical issues are left undecided, the Petitioner may not ask for a writ of certiorari from the Supreme Court of the United States nor may the Petitioner appeal to that Court because it is considered a nonfinal decision of a lower State Court, Collins v. Miller, 252 U.S. 364, 370 (1920), Houston v. Moore, 3 Wheat. 433, 434 (1818). It is nonfinal in so far as it did not reach critical issues that could have dictated an opposite result, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621,632-33 (1981), Whitney v. California, 274 U.S. 357, 360 (1927).

In the instant case, the federal district court had jurisdiction to issue an injunction to stay enforcement of the decision and order of the Appellate Division of the Supreme Court of the State of New York. The Feldman case, supra does not foreclose the Petitioner from access to the federal district court where a nonfinal decision of an intermediate state appellate court has effectively deprived the Petitioner of his rights protected by the 5th, 14th Amendments to the Constitution of the United States, 42 U.S.C. § 1983, and to the right to trial by jury protected by the New York State Constitution under N.Y.S. Const. of 1894 Art. VI §§ 1, 2, 4k, New York State

Constitution Art. 1 § 2, 1848 N.Y. Laws, ch. 3791876 N.Y. Laws, ch. 448.

On page 8 of its brief the Respondent cited Theard v. United States, 354 U.S. 278, 281 (1957) for the proposition that "Suspension by a federal court does not automatically flow from suspension by a state court."

Theard, a practicing attorney in Louisiana, was convicted of forging a promissory note there, and disbarred by the State Court. The federal court likewise disbarred him based on the basis of the state decision. This Court, relying on Selling v. Radford, 243 U.S. 46, 50 (1917) reviewed the facts and the law, deemed the district court's reliance on the state decision error, and remanded the matter to the federal court for further proceedings in accordance with the standards defined in the Selling case.

One problem with reliance on Selling is that the federal court proceeding emanates from a state criminal conviction by a jury. There was no issue of subject matter jurisdiction. Reliance of one court's decision by another court must first determine if the court relied on had the authority to make the decision. Then and only then does the "determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts", (at page 282 of Theard) . The Petitioner herein was never afforded the standard set in the Selling case.

In Radford case no one ever challenged whether the Michigan State Court had subject matter jurisdiction to determine the issues necessarily decided therein. Such is not the case herein. Radford had been disbarred by a Michigan court for committing a "moral wrong" which was reviewed and approved by that state's highest court, the Michigan Supreme Court, in a certiorari proceeding.

In Petitioner's case there has never been a specific finding of any moral wrong committed by the Petitioner by any court, state or federal. In the Petitioner's case the highest court never decided or

reviewed the issues presented on the merits, nor did it ever make a specific finding of any moral wrong committed by the Petitioner.

On page 8, the Respondent also cited a portion of the Selling case which is essentially the same as Rule 4(g) of the Rules of the Eastern District Court For New York. Rule 4 states in pertinent part:

> Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion of the other court; or (2) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (3) that the imposition of discipline of this court would result in grave injustice.

This is exactly what the Petitioner demonstrated to the courts below, both in the Petitioner's response to the district court' order to show cause and to the advisory panel at the conferences.

Specifically, the record in the State proceeding below showed that over the Petitioner's continuing objection 1) the Petitioner was not permitted to enter into evidence an authenticated tape recorded conversation of the complainant to impeach the complainant during cross-examination of the complainant, 2) the Petitioner was denied the opportunity to use tape recorded conversation during cross-examination of the complainant, 3) the referee refused to recall the complainant for further cross-examination when the authenticated tape recorded conversation of the complainant was entered into evidence at the conclusion of the

hearing, 4) the referee used as part of his decision making process the content of an affidavit of a hostile witness who did not appear and was not subject to cross-examination, but who was Court ordered to appear to testify and to produce his books and records, 5) the Petitioner was not given notice of the state's intention to refer to, include or use as a measure of the discipline to be imposed, the prior acts of the Petitioner that were the subject of prior discipline, 6) the Petitioner was not afforded an opportunity to explain or confront the issues raised by these prior acts during the hearing, 7) the Referee completely, arbitrarily and without support in the record eliminated all the value of the legal services Petitioner rendered to the complainant in the family court proceedings, 8) the Petitioner was not afforded an opportunity for any discovery prior or during the hearing, 9) the signed and acknowledged promissory notes were declared void without any showing of fraud, misrepresentation or overreaching, 10) the confessions of judgment of record were vacated by a court of limited jurisdiction without authority of law and without any showing of fraud, misrepresentation or overreaching and 11) there were no facts in the record to demonstrate that the statement in one judgment absolving the Petitioner from liability had anything to do with limiting the Petitioner's liability for his acts or omission in representing the complainant.

There is the additional matter that occurred during the state proceeding when the Petitioner tried to initiate reconsideration of the referee's findings. Justice Vincent Balletta, was assigned by the Appellate Division Second Department of the Supreme Court of the State of New York to review the Petitioner's application for reconsideration. Justice Balletta called a conference at which the chief prosecuting attorney for the grievance committee, Robert P. Guido, Esq., the Petitioner and the judge's own law secretary were present. At that conference, during the time the Petitioner was explaining why he application should be granted, Justice Balletta

reached into his desk drawer and removed a file and began reviewing it. The Petitioner asked if the papers in the file were related to this matter. The Judge replied that it was a dossier on the Petitioner. The Petitioner asked if he could see the information that the judge was studying. The judge said no. The Petitioner asked if the information was part of the record in the Petitioner's disciplinary matter. The judge responded that, "No, files like this one are kept on many attorneys. This is the one on you." The Petitioner then asked if the information that was in the dossier would be used as part of the decision on the Petitioner's application. The Judge said that after reading the file he was not likely to overturn his "brothers". Neither the chief prosecuting attorney, Robert P. Guido, Esq., nor his own law secretary made any comment regarding the dossier or the judge's actions. The judge wrote "denied" on the application as we sat there.

These restrictions, violations of Petitioner's rights to due process in presenting his own defense and the sheer impropriety of the actions taken below raise the very items that were set forth in paragraph (g) of Rule 4. Underlying these factors, however, is the claim that the Federal Grievance Committee Proceeding could not rely on a state court that did not have subject matter jurisdiction to hear or decide the issues decided .

The Respondent cited In re Snyder ,472 U.S. 634, 643 (1985), Curry v. Del Priore, 941 F.2d 730, 731-732 (9th Cir. 1991) (citing Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978); Pfeifer v. Sentry Insurance, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331, 334 (Iowa 1980) as authority for the proposition that:

"Courts have long recognized an inherent authority over the conduct of attorneys who practice before them, which authority derives from the lawyer's role as an officer of the court which granted admission. Based upon that inherent authority, courts have also held that they have authority to protect a client from excessive legal fees."

These cases have nothing whatever to do with the inherent authority of a court of limited jurisdiction to hear and determine the quality, nature, extent and value of an attorney's legal services or for that court to delegate this responsibility to a referee within the construct of a grievance committee disciplinary proceeding.

The Snyder case dealt with an attorney who was appointed to represent a defendant in a federal district court criminal proceeding. The controlling federal statute required the judge hearing the case to review and approve expenses for compensation in excess of $1,000.00, 18 U.S.C. §3006A (d)(3).The bill submitted was for $1,796.05. This case specifically refers to the controlling statute conferring jurisdiction on the Court to do the very thing the Petitioner is complaining is absent in his case. This part of the Snyder case has nothing to do with a court's "inherent authority." The Respondent took part of the first paragraph on page 643 and combined it with a part of the Curry case to produce a statement to be relied on by this Court. To use this case for that proposition is clearly misleading. The part of the disciplinary side of the Snyder case properly reflects the position of the Court as seen on page 642, beginning, " The gravamen of the situation is that Snyder in his letter of October 6, 1983 became harsh and disrespectful to the Court."

The Respondent cited the Curry, Coffelt, Pfeifer and Wunschel cases as authority for the Court's "inherent authority" to protect a client from excessive legal fees. None of these cases apply the concept of "inherent authority" for this purpose.

The Curry case was concerned with a federal district court, that while in the course of ongoing litigation before it as a trial court, took "ancillary jurisdiction" to resolve a fee dispute between the plaintiff and the defendant. In that case the conflict arose during the trial when counsel for the defendant moved the court to

withdraw as counsel. It was then that the sitting court took "ancillary jurisdiction" to decide the issue of his attorney's fee.

This is the reverse of what happened to the Petitioner herein. When the Petitioner applied to the trial court which had jurisdiction over the matrimonial action to settle the question of Petitioner's legal fee, the trial court declined, stating that the matter was then before the grievance committee. In the Petitioner's case the very court with jurisdiction to hear the issue (ancillary jurisdiction) refused in deference to a quasi-judicial body which had no subject matter jurisdiction over the matter of evaluating the Petitioner's legal fees.

In the Pfeifer case the defendant asked the trial court to determine reasonable attorney's fees in response to the bill submitted by a group of attorneys in the case during the litigation.

Again, this has nothing to do with "inherent authority" of a court. In Pfeifer the parties voluntarily submitted the question to the court before whom they had submitted the entire controversy. In Petitioner's case the power of the state was brought to bear on an involuntarily subject who objected to the entire proceeding. This case is again authority for "ancillary jurisdiction" not for the proposition suggested by the Respondent.

In the Wunschel case the issue was whether the court should approve contingent attorney fee contracts for the defense of unliquidated tort damage claims. This court held that attorney's fees were to be tried at a court of law. The court said that the evidence in the case was to be viewed in its light most favorable to the judgment. This case, again, doesn't stand for the proposition of "inherent authority."

In the Coffelt case, the trial court disqualified an attorney because of a conflict of interest and reduced his fee from $1,000.00 to $100.00 based on what the court perceived as fairness and equity because of the early termination of the proceeding and the attorney's obvious lack of preparation for trial. This action was taken by the district court that had subject matter jurisdiction over

the criminal trial. The Respondent again confuses ancillary jurisdiction with inherent authority.

All of these cases cited by the Respondent deal with trial courts and their jurisdiction within the confines of the litigation before them to determine the participating fees of the attorneys representing the parties. They have nothing to do with the authority of a court of limited jurisdiction to hear and determine the quality, nature, extent and value of an attorney's legal services, or for that court to delegate this responsibility to a referee within the construct of a grievance committee disciplinary proceeding.

On page 10 the Respondent cited Gair v. Peck, 160 N.E.2d 43,51, 53 (1959) for the proposition that "the Appellate Division's authority extends to legal fees charged by members of the New York Bar; and the idea is frivolous that the disciplinary authority over attorneys is unrelated to the exaction of excessive fees." The problem is that the Respondent didn't clarify what the Court's holding was or its basis.

The Gair case dealt with the rule making power of the Court to promulgate a rule setting forth the boundaries of contingent fee agreements between attorneys and their clients in tort negligence cases. At the top of page 113 the Court said,

> "Moreover, what is of utmost importance, these schedules are merely presumptive of what constitutes an exorbitant fee in a particular case. The way is left open in any case to an attorney to come into court on the full showing of all the facts and circumstances, with an opportunity to establish that these prima facie percentages do not indicate correctly that the stipulated contingent fee in this case is unlawful due to being unconscionable... that is to say, whether it is such an amount as to be collectible *in an action between attorney and client on the contingent fee retainer agreement*... The matter here claimed to be wrong about the rule is that it calls upon the lawyer to make this showing (if his contingent fee exceeds the

scheduled percentages) before rather than after collection of the fee."

The Court specifically said that the attorney is entitled to an action at law to determine the amount of legal fee. The Court also held that it may not make a rule that by its operation changes the substantive law of the State. This is consistent with the propositions and holdings of the New York Courts, namely that an attorney's claim for work, labor and services was, and is, enforceable by a suit at common law, for money damages only, called Assumpsit, now called Breach of Contract, Lynn v. Agnew, 179 A.D. 305, 166 N. Y. S. 274, judgment affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654, Stevens & Cagger v. Adams, 23 Wend. 57, affirmed Adams v. Stevens & Cagger, 26 Wend. 451, Spencer v. Bush, 98 N.Y.S. 690, Werner v. Knowlton, 94 N.Y.S. 1054, 107 A.D. 158, Greenberg v. Jerome H. Remick & Co., 129 N.E. 211, 230 N.Y. 70, reversing judgment 181 N.Y.S. 987, 191 A.D. 947. That, as a matter of history and legal precedent, the issues of controverted fact within this claim were entitled to be tried and determined before a jury as a matter of right, Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, Werner v. Knowlton, supra, Steele v. Hammond, 121 N.Y.S. 589, 136 A.D. 667, Everitt v. Mitchell, 202 N.Y.S. 260. To the same effect is Ex Parte Wall 107 U.S. at 288, in which the Court said "... The action of the court within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorneys calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration."

The Petitioner does not take issue with the power and authority of the Appellate Division of the Supreme Court of the State of New York under section 90(2) of the Judiciary Law to have original jurisdiction to discipline attorneys. That is the clear

mandate of the statute. Nor does the Petitioner contend that section 474 of the N.Y. Judiciary Law insulates attorneys from disciplinary examination, in appropriate circumstances. See Respondent's brief note 7., page 10.

What the Petitioner contends is that before the Appellate Division can assume jurisdiction pursuant to section 90(2) over the attorney based on a charge of an excessive fee, the attorney is entitled to have his attorney's fee evaluated by a trial court at law with all the protections heretofore afforded such actions at law. The New York State Appellate Division put the cart before the horse. It has no authority to do the evaluative process within the proceeding to discipline. No case or other authority has been found in either the state digests or federal digests by this Petitioner or within the borders of the Respondent's brief to stand for the Respondent's view.

The Petitioner asserts that the State of New York, its political subdivisions, agents of the Committee and the Appellate Division were without constitutional and statutory authority deciding or in delegating to a referee, holding a hearing, determining controverted issues of fact concerned with evaluation of attorney's fees within the construct of a disciplinary grievance committee hearing, and punishing the Petitioner, as a result of their findings. The Petitioner takes the position that the Federal Grievance Committee decision was also void because it was based on a void decision of the State appellate court and in contravention of the Petitioner's due process rights to an adversary proceeding. Similarly, the Petitioner takes the position that he was deprived of his liberty without authority of law.

A disciplinary hearing is an adversary proceeding. It is criminal in nature since it involves the loss of livelihood, In re Ruffalo, 390 U.S. 544, 551. Any ambiguity or doubt must be resolved in favor of the attorney who is the subject of the disciplinary hearing, Erdmann v. Stevens, 458 F.2d 1205, Rosenthal v. Justices of the S. Ct. of California, 910 F.2d at 564,[6,7].

The Respondent cited United States v. Zucker, 161 U.S. 475, 481 (1896) and Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 564-565 (9th Cir. 1990), In re Daley, 549 F.2d 469, 474-477 & n.6 (7th Cir.), cert. denied 434 U.S. 829 (1977), as authority for the proposition that an attorney Federal Disciplinary Proceeding is not a criminal prosecution and neither the Fifth, Sixth, or Seventh Amendments apply, Minneapolis & St. L R.R. v. Bombolis, 241 U.S. 211, 217 (1916).

The Zucker case dealt with the issue of the admissibility and use of a deposition taken in Paris, France of a witness against the defendant in a civil action in the United States. The Court said that since the action was civil and not criminal, neither the Fifth nor the Sixth Amendment attached. This is a far cry from what happened in the Petitioner's State Proceeding. In Petitioner's case the referee, over the Petitioner's objection, used, as part of his decision making process, the content of an affidavit of a hostile witness, who did not appear, and was not subject to cross-examination, but who was Court ordered by this very referee's "So Ordered" Subpoena to appear to testify and produce his books and records. Note 8 at the bottom of Respondent's brief on page 12 is completely misleading and erroneous. The record of the State Proceeding demonstrated that the referee did not permit the Petitioner the use of the transcript of the complainant's tape recorded statements to cross-examine her while she was present. Furthermore, when, at the close of the hearing, the referee permitted the tape to be entered into evidence, the complainant had already been excused and the referee refused over Petitioner's objection to recall her.

In the Federal Grievance Proceeding the "Advisory Panel" never granted the Petitioner a hearing, no witnesses were called, no testimony taken and no records entered into evidence. There was no one present for the first two meetings except the "panel and the Petitioner. It wasn't an adversary proceeding. There was no adversary present, except possibly the Advisory Panel itself. In the Petitioner's case he was not given notice of the state's intention to

refer to, include or use as a measure of the discipline to be imposed, the prior acts of the Petitioner that were the subject of prior discipline nor was the Petitioner afforded an opportunity to explain or confront the issues raised by these prior acts during the hearing. In the Federal Grievance Proceeding the "Advisory Panel" simply referred to all of the criteria that the Petitioner objected to in the State Proceeding and incorporated them without scrutiny or test.

In the Daley case the issue of enforcing an injunction arose with respect to the testimony of a defendant and dealt specifically with the issue of self-incrimination (Fifth Amendment) by a defendant. The defendant was promised immunity if he testified in the Federal Court. Later the State wanted to use his Federal Court testimony in a State Disciplinary Proceeding against him. The Court said that the label of a proceeding, whether civil or criminal doesn't control. Page 476 of the opinion the reflected that the Court of Appeals refused to intervene in the State Disciplinary Proceeding because of the gravamen of the State's interest. It said the Court should be slow to intervene (p.476). It permitted the use of the testimony because it said the grant of immunity was beyond the power of the Federal Prosecutor. This case certainly demonstrates that the Court took jurisdiction of the issues presented, decided that it can enjoin enforcement of a State Court Order, decide the issue of jurisdiction of the Federal Prosecutor and consequently decide issue of enforcement of the State Court Order. The power or authority to grant the immunity has to come from the legislature. In this case there was no authority granted tot the Federal Prosecutor. In the Petitioner's case there was no authority granted to the Appellate Division of the Supreme Court of the State of New York.

In the Bombolis case the issue was whether the Seventh Amendment applied to the State Legislature and to the conduct of the state court in enforcing a trial at law of the State?

In Petitioner's case the complaint is not only that the State of New York violated the Petitioner's rights under its own Constitution, but that the Federal Grievance Proceeding did not afford the Petitioner a trial by jury on the issue of his attorney's fee. It is Petitioner's position that 1) the Federal Grievance Process cannot rely on a decision of the State that denies the Petitioner his right to a jury trial under its own (State) constitution, 2) once the Petitioner challenges the subject matter jurisdiction of the Court relied on by the Federal Grievance Committee, the issue of subject matter jurisdiction must be determined before the Selling case or any other case becomes applicable.

On page 13 the Respondent cited Williams v. New York, 337 U.S. 241, 245-247, 250-251 (1949) and Nichols v. United States, 114 S.Ct. 1921, 1927-1928 (1994) as authority for the proposition that it was correct for the State and Federal Grievance Courts to consider three prior incidents of discipline in ordering the Petitioner's three year suspension from practice.

In the Williams case the defendant was charged and convicted by a jury of murder in the 1st degree. The Court considered information as to his prior criminal record in the sentencing proceeding without the defendant examining any witnesses on the subject. The Judge then, pursuant to the authority granted the Judge by statute, modified the jury's recommendation of life imprisonment to death..

The Court however, at page 244 of the opinion stated that the judge enumerated and referred to the defendant's past criminal experiences as brought out by the probation department's report and gave the defendant an opportunity at the sentencing hearing to refute, explain, discredit or challenge them by cross-examination or otherwise. Neither the defendant nor his counsel took advantage of that opportunity to challenge the report nor was the judge asked to disregard any of them.

In the Petitioner's case no such opportunity was provided for and no notice of intent to include Jacobs' prior incidents was provided.

Here the Respondent used prior criminal convictions or prior criminal behavior. It didn't seem to be incongruous to the Respondent that if its position is that Grievance Committee Proceedings are not criminal, then why cite criminal cases as precedent and controlling authority?

This tact seems not only incongruous to the Petitioner, it is clearly and unmistakably misleading and erroneous. In the first place the idea of being apprised in advance and an opportunity to be heard on the matters to be considered go to the heart of the matter. Contrary to the Respondent's note 9. at page 14 of its brief the case of Sexton v. Arkansas Supreme Court, Comm. on Professional Conduct, 730 F. Supp. 285 (W.D. Ark 1990) is completely adverse to what the Respondent suggests. The Court's opinion at the bottom of page 286 stated specifically,

" An attorney in disciplinary hearings is 'entitled to procedural due process, which includes fair notice of the charge,' citing In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968).

It follows from this that if defendant considered a prior disciplinary action against plaintiff in its decision, it should have notified plaintiff that such misconduct would be considered. Thus, the question presented is whether, as a factual matter, received such notice." The Court went on to decide that he actually received such notice during the disciplinary hearing.

No such information was conveyed to the Petitioner herein. The Petitioner did not know at any time during the disciplinary hearing that any prior disciplinary action would be before this referee or the Court in consequence of the present disciplinary action. That is the reason no objection was made on the record during the hearing.

The Respondent brief at page 14 begs the question revealed by the Sexton case. It is not that the Petitioner did not claim that he was not the subject of the prior disciplinary actions taken. The issue is notice in advance or contemporaneously with the grievance disciplinary proceeding that Sexton talks about.

Furthermore, the record in Petitioner's case does reflect, as the Sexton case pronounces at page 288-289, that the refusal to permit the Petitioner discovery did "alter the rules of evidence and required less or different testimony in order to convict the offender." The Petitioner argues that when the evidence, by which guilt or responsibility can be refuted, is at the door and has been ordered to be brought in for review by the referee, the refusal by the referee to open the door or have it opened produces 14th Amendment violations of due process. Here Dominick Pelle, Esq. represented the husband in both the Matrimonial and the Family Court proceedings. He and his business records listing the time, place, hours and charges in connection with the Matrimonial and the Family Court proceedings were critical information to the Petitioner who could obtain such information from no other source. Both Mr. Pelle and the Petitioner were in the same Courts at the same times for the same reasons representing adverse parties. These records would have substantiated and proven the critical times that the Petitioner was in Family Court conducting hearings that amounted to approximately 40% of the fees charged. The only other evidence that the Petitioner had to offer were his notices of appearance, which indicated the place, date and the time of arrival in Family Court on the complainant's matters, but did not reflect the time departure from Family Court. The Petitioner's testimony as to this was completely discounted by the referee. In consequence none of the time expended on six family court petitions for the complainant was counted towards the Petitioner's total time expended on complainant's matters so as to justify he legal fee charged but never collected. The Nassau Family Court Records were in evidence but did not state the number of hours that legal

services were performed for the complainant. The Petitioner reasonably believed and in good faith requested the referee to subpoena Mr. Pelle and his records. This was done. However, when the critical time came to produce Mr. Pelle the referee accepted his affidavit in lieu of individual testimony and review of the records. The Petitioner reasonably believed in good faith that Mr. Pelle' records would have shown the missing information. This information it is believed would have altered the basic facts of the case.

The Petitioner was likewise denied the opportunity to examine Mr. Pelle or his records in the Federal Grievance Proceeding.

The Petitioner argues that when the State or the Federal Government initiates a proceeding which can result in the 1) loss of livelihood, 2) separation from society, colleagues and friends by stigmatizing the individual, 3) loss of property or interest therein, or at least modify the individuals contract rights through a loss of status, 4) restrict his employment opportunities, the individual has been subjected to nothing less than what has been historically a penal proceeding and penal penalties. The whole purpose of the State or Federal Disciplinary Proceeding is to protect the public and vindicate the State. At the very time that his life and his family economic survival are put at risk, the very people who are initiating the proceeding remove the safeguards of the Fifth, Sixth, Seventh, Eight and Fourteenth Amendment protections. It is the Petitioner's contention that the penalty exacted from the Petitioner were and are continuing to be so overwhelmingly disproportionate compared to acts found to have been omitted by the Petitioner that as a matter of law the discipline imposed amounted to a criminal penalty of such magnitude as to violate the Petitioner's Eight and Fourteenth Amendments. When the power of the government brings to bear its weight and can destroy a citizen's life, without these basic protections the proceeding is more akin to a Star Chamber Proceeding than to a balanced method for adjudicating the truth.

The Petitioner claims that the Appellate Division of the State of New York did not have subject matter jurisdiction within the construct of a Grievance Committee disciplinary hearing and/or without a prior trial by jury in a Supreme Court Trial Term to 1) determine the Petitioner's right to a specific sum for work, labor and services performed, 2) direct the Petitioner to vacate judgments of record, 3) punish and penalize the Petitioner by bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or 4) prevent the Petitioner from obtaining employment in any category or subcategory of work in the law field.

CONCLUSION

The Petition for a writ of certiorari shaould be granted.

August 28, 1995

Respectfully submitted,

DAVID B. JACOBS